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No. 93-772

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PETE WILSON, Governor of the State of California;
JAMES W. VAN LOBEN SELS, Director of the
California Department of Transportation,
Petitioners,

v.

WILLIAM BIGGS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

ARGUMENT

Introduction

The district court and the court of appeals both ruled that, under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, a covered employer—whether public or private—must make timely payments to covered employees of their wages as provided for in the Act at the conclusion of their pay period. In the circumstances here, both courts ruled that because the employer did not meet that statutory duty, the employees were entitled to declaratory relief, prejudgment interest on their deferred compensation, and reasonable attorneys fees. At the same

time, the lower courts *denied* the employees' requests for liquidated damages and for injunctive relief. Pet. App. 59-63.

The *certiorari* petition argues that the decisions below present a novel question of statutory construction, that the courts below answered that question incorrectly, and that their ruling works an unconstitutional intrusion into the rights of the states under the Tenth Amendment. As we now show, none of these points is well taken. The decision below simply follows well settled law, correctly applies that law to uncontested facts, and does so without working any intrusion into the constitutional rights of the states.

A. The Decision Below Correctly Applies Well-Established FLSA Law.

Petitioners mischaracterize the decision below as "a case of first impression." Petition for a Writ of Certiorari ("Pet.") at 7. In fact, that decision rests on an FLSA "timely payment" requirement that has been uniformly recognized for decades.

1. Over the past fifty years, every circuit that has examined the question has concluded that the FLSA requires a covered employer to pay to its covered employees their statutorily prescribed compensation "when due in the regular course of employment." *Seneca Coal & Coke Co. v. Lofton*, 136 F.2d 359, 363 (10th Cir.), *cert. denied*, 320 U.S. 722 (1943). *Accord, Rigopoulos v. Kervan*, 140 F.2d 506, 507 (2d Cir. 1943) (FLSA "plainly contemplates that overtime compensation shall be paid in the course of employment and not accumulated beyond the regular pay day"); *Birbalas v. Cuneo Printing*, 140 F.2d 826, 828 (7th Cir. 1944) ("failure to pay [compensation] when due, was a violation"); *Atlantic Co. v. Broughton*, 146 F.2d 480, 482 (5th Cir. 1944), *cert. denied*, 324 U.S. 883 (1945) ("if an employer on any regular payment date fails to pay the full amount of the minimum wages and overtime compensation due to an employee,

there immediately arises" a violation); *United States v. Klinghoffer Bros.*, 285 F.2d 487, 491 (2d Cir. 1961) ("prompt payment . . . requirement is clearly established by the authorities"); *Olson v. Superior Pontiac-GMC, Inc.*, 765 F.2d 1570, 1578 (11th Cir. 1985) (FLSA requires "that the employee receive 'prompt payment' of the minimum wage covering all hours worked during the pay period. . . . The employee must *actually receive* the minimum wage each pay period."), *modified on other grounds*, 776 F.2d 265, 267 (reasserting that employer may not "defer compensation" if doing so would result in "pay[ing] an employee less than the minimum wage during a pay period"); *Martin v. Selker Bros.*, 949 F.2d 1286, 1299 (3d Cir. 1991) (FLSA requires payment of "proper wages at the time they were due"); *Calderon v. Witvoet*, 999 F.2d 1101, 1107 (7th Cir. 1993) ("the FLSA requires timely payment . . . [and prohibits] deferred payment" of statutory wages). *See generally* Pet. App. 12-16 (discussing cases).

The Petition wholly ignores this uniform line of authority, despite its obvious relevance, and despite the court of appeals' citation of the cases just noted. Pet. App. 14-16.

2. The Department of Labor's long-standing interpretation of the FLSA—an interpretation that is entitled to "great deference" since the Department is the agency charged by Congress with the FLSA's enforcement, *Udall v. Tallman*, 380 U.S. 1, 16 (1965)—is to the same effect.

In 1961, the Department issued a formal opinion letter regarding the legality of an employer's decision to defer payments of wages, as prescribed by the FLSA, beyond the employees' regular payday. The Department's interpretation of the Act could not have been clearer:

> [T]here is no requirement that compensation must be paid weekly. However, the minimum wage due for a particular workweek must be paid on the regular payday for the period in which such workweek ends.

> . . . The employee is due in full on each regular payday the compensation which would at least equal the minimum wage applicable under the Act. Wage-Hour Opinion Letter No. 63 (November 30, 1961) (*reprinted in* [1961-1966 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,581).]

And, the Department has repeatedly reaffirmed this view in subsequent opinion letters and regulations. *See* Wage-Hour Opinion Letter No. 1296 (November 27, 1973) (*reprinted in* [1973-1978 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,900) (two week delay in FLSA wage payments beyond normal payday would violate Act); Wage-Hour Opinion Letter No. 942 (January 27, 1969) (*reprinted in* [1966-1969 Transfer Binder] Lab. L. Rep. (CCH) ¶ 30,954 ("[t]he Act requires that employees must be paid on the regular payday"); 29 C.F.R. § 778.106 (1992) (overtime compensation must be paid by employees' regular payday).

As was true with respect to the court of appeals jurisprudence, the Petition wholly ignores the Department's rulings despite their obvious relevance, and despite the Ninth Circuit's express reliance on these rulings. Pet. App. 16-17.

3. The court of appeals decisions and Labor Department's rulings just noted are fully supported by this Court's decision in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945).

The *Brooklyn Savings Bank* case involved an FLSA action brought by an employee whose employer had failed to pay overtime compensation in a timely manner, but had, prior to the commencement of the action, paid all back wages due, albeit without any interest or other enhancement to account for the lateness of payment. When the employee brought an action seeking liquidated damages under the Act, the employer argued—as petitioners argue in this case—that the late payment of

FLSA wages is not in itself a violation and that the Act is violated "only if the employee is compelled to sue for minimum wages due." 324 U.S. at 711.

The Court squarely rejected this argument, holding that an employer's refusal to pay FLSA wages when those wages become due—and to instead delay the payment of such wages—constitutes a violation of the Act. As the Court explained, the Act's provision for such recoveries "constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency, and general well-being of workers' and to the free flow of commerce, that [such enhancements as liquidated damages] must be made *in the event of delay* in order to insure restoration of the worker to that minimum standard of well-being." 324 U.S. at 707 (emphasis added; *quoting* FLSA § 2(a), 29 U.S.C. § 202(a)).[1]

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[1] The FLSA's allowance of liquidated damages is only one of several aspects of the Act that make clear that there is a timely payment requirement. For example, the Act's statute of limitations provision refers to a point in time after which an FLSA action "accrue[s]," 29 U.S.C. § 255(a). As the court below put it, such a limitations provision must "start running from some point, and the most logical point a cause of action for unpaid minimum wages or liquidated damages . . . accrues is the day the employee's paycheck is normally issued, but isn't." Pet. App. 10. *See* to the same effect, *Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988); *Beebe v. United States*, 640 F.2d 1283, 1293 (Cl. Ct. 1981); *Mid-Continent Petroleum Corp. v. Keen*, 157 F.2d 310, 316 (8th Cir. 1946).

Similarly, the Act's remedial provision (allowing prejudgment interest for "unpaid" wages, 29 U.S.C. § 216(b)), also requires the determination of a date after which wages are considered "unpaid." As the court below noted, wages must be considered "unpaid as of some distinct point, otherwise courts could not compute" proper remedies. Pet. App. 8. And, "[t]he only logical point that wages become 'unpaid' is when they are not paid at the time the work has been done, the minimum wage is due, and wages are ordinarily paid —on payday." *Id.* at 9.

Brooklyn Savings Bank controls this case. That decision leaves no doubt that the FLSA requires employers to pay the statutorily required wage *on a regular and timely basis* and ensures to employees that relief will be available should an employer refuse to make such timely payments.[2]

Once again, the Petition does not even mention *Brooklyn Savings Bank* even though the Ninth Circuit expressly relied upon its holding and reasoning. *See* Pet. App. 11-14.

4. While the Petition is light on the relevant legal materials, it is heavy on apocalyptic rhetoric warning of the potentially "disastrous consequences" of the decision below. Pet. App. 9. That decision has no such potential.

a. The Petition insists that "[t]he Ninth Circuit has fashioned a rule" under which "an employer who is even *one day late* in making payroll will be *automatically* penalized under the liquidated damages provisions of the FLSA in an amount of 100 percent of that portion of the employee's wages that represents the minimum wage." Pet. 9 (emphasis in original; *citing* 29 U.S.C. § 260). And this will occur, petitioners warn, even when "[d]elays in making payroll" occur because of "natural disasters, death or illness, computer failure, late mail, bank-

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[2] At the time the Court decided *Brooklyn Savings Bank*, an award of liquidated damages was mandatory upon a finding of a violation. In 1947, however, Congress created a qualified "good faith" defense to liability for liquidated damages. 29 U.S.C. § 260. The district court below, in part relying on this qualified defense, denied the employees' request for liquidated damages, and instead awarded prejudgment interest as the means of compensating the employees for the late payments.

Obviously, neither the 1947 amendment, nor the denial of liquidated damages in this case, in any way affects the relevance of *Brooklyn Savings Bank*. These distinctions relate to the precise forms of relief available to compensate for the late payment of FLSA wages, not to the legal principle that employees who suffer late payments have suffered a violation of the Act and may seek appropriate compensatory relief.

ruptcy, or fiscal crises." *Id.* The decision below is exactly to the contrary.

The district court *denied* the employees' request for a liquidated damages award in this case. *See* Pet. App. 59-63; *see also* 29 U.S.C. § 260 (allowing for qualified "good faith" defense to liquidated damages request). Instead, the district court awarded *only* prejudgment interest. And, the court of appeals decision expressly rejected the argument that the "timely payment" rule would result in "automatic" liquidated damages awards against faultless employers:

> Nor do we agree with [the employer's] suggestion that a rule that paychecks are due on payday unfairly penalizes employers who happen to be late in paying their employees. An employer who acts in good faith is not subject to liquidated damages, 29 U.S.C. § 260. . . . [T]he employer remains obligated to pay overdue wages and is subject to prejudgment interest on the unpaid wages in the event of litigation. . . . [Pet. App. 12.][3]

In sum, all that the decision below requires of a reasonable, faultless employer who does not make the timely payment of wages as provided for in the FLSA is interest on the late payment. Both common sense and over 45 years of experience make it plain that such a requirement is no threat to employers, be they public or private.

b. Equally to the point, while the Petition stresses the needs of "reasonable" and "faultless" employers who do

[3] To be sure, petitioners attack the court of appeals decision for its assurance that "faultless" employers acting in "good faith" will not be liable for liquidated damages, insisting that the liquidated damages provision is far less flexible than the court of appeals said it is. On that premise, petitioners urge that late payments be allowed under the statute in order to avoid the result of unreasonable awards of liquidated damages. *See* Pet. 9-10.

In essence, this is an argument that the decision below should be reviewed and reversed in order to foreclose an untoward result that the courts below never reached.

not meet a payday, petitioners, in the courts below, did *not* argue for an FLSA rule on late payment that makes any distinctions based on "fault" or "reasonableness." Instead, petitioners argued that the FLSA imposes *no* requirements whatsoever regarding the timely payment of wages.

Virtually all of the Petition's arguments regarding "faultless" or "reasonable" employer delays in wage payments were voiced below in the separate opinion of Circuit Judge Trott. *See* Pet. App. 20-25. But, as Judge Trott explained, in *this* case petitioners "passed up [the] opportunity to demonstrate to the district court that [the] delay in payment was reasonable, preferring instead to argue that the statute only prohibits nonpayment, not late payments." Pet. App. 25. Accordingly, Judge Trott —who agreed that the FLSA *does* prohibit late payments, even if it also accounts for the interests of "faultless" and "reasonable" employers—"concur[red] in the outcome of this case." *Id.*[4]

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[4] The disagreement below between the court of appeals majority and the separate opinion of Judge Trott was not over whether the FLSA contains a "timely payment" requirement (all agreed that it does); nor was the dispute over the outcome of the case (all agreed that petitioners are liable for violating the FLSA "timely payment" requirement). Rather, that disagreement concerned the details of precisely how the FLSA's "timely payment" requirement should be applied.

The court of appeals majority adopted the view that a violation of the FLSA occurs whenever an employer fails to pay required wages on a regular payday. *See, e.g.*, Pet. App. 19. In contrast, Judge Trott argued that the FLSA requires "payment which is reasonably prompt under the totality of the circumstances," which was the standard that the district court had adopted. Pet. App. 22 (*quoting* district court; *see* Pet. App. 57). As noted in text, the majority and Judge Trott agreed that, under either approach, petitioners violated the FLSA "timely payment" requirement. *See also id.* at 57 (district court finding that "[t]he record shows that responsible state officials elected voluntarily and unnecessarily to withhold payment . . . [and that therefore] wages due . . . were not paid with reasonable promptness").

B. There Is No Federalism Concern That Calls For An Interpretation Of The FLSA In This Case That Deviates From Well-Established FLSA Law.

Petitioners argue that "[t]he Ninth Circuit's conclusion . . . "is plainly in error in light of *Gregory* [*v. Ashcroft*, —— U.S. ——, 59 L.W. 4714 (1991)]." Pet. 17. As the court below recognized, the *Gregory* "plain statement" rule is of no aid to petitioners here. *See* Pet. App. 19 ("*Gregory*'s plain statement rule is satisfied here since the FLSA clearly applies to state employees such as Biggs").

In *Gregory*, this Court held that the *coverage* provisions of the Age Discrimination Employment Act, 29 U.S.C. §§ 621-634, do not extend federal regulation so as to reach state judges. In reaching this conclusion, this Court declared that a federal statute will not be construed to regulate in areas of traditional state sovereignty, and thereby "upset the usual constitutional balance of federal and state powers," unless Congress "make[s] its intention to do so unmistakably clear in the language of the statute." 59 L.W. at 4716-17.

Gregory's "plain statement" rule thus involved the threshold question of *whether* Congress intended that a certain traditional state function be subject to a federal regulatory scheme. In this case, there is no controversy concerning that threshold issue. The language of the FLSA puts it beyond question that Congress did intend that state compensation practices regarding employees of the kind at issue here (highway maintenance workers) should be governed by the Act. *See* 29 U.S.C. §§ 203(d), (e) & (x) (provisions clearly stating that state employees are governed by FLSA).[5]

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[5] As early as 1974, Congress *unmistakably* applied the FLSA to state employees such as respondents, when the Legislature "extend[ed] FLSA coverage to virtually all state and local government employees." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985) (*citing* 88 Stat. 58, 60). In 1985, Con-

Given Congress' unmistakable intent to apply the FLSA to the employees in question, the only issue remaining is to determine the *precise substantive content* of the FLSA regulatory scheme. The imposition of a "clear statement" rule in this context would be unprecedented. This Court has never applied such a rule in this context. *See, e.g., Moreau v. Klevenhagen*, —— U.S. ——, 59 L.W. 4714 (1991) (construing FLSA overtime requirements as they apply to state employees, without any reference to *Gregory* or to any other "clear statement" rule). And, petitioners cite no authority from any other court for the proposition that a "clear statement" rule governs the interpretation of those federal statutes that do unmistakably apply to traditional state functions.

The logic of *Gregory* itself argues against petitioners' attempted expansion of the decision. *Gregory* states a special rule to answer an especially sensitive federalism question, *viz.*, whether Congress intended to expand coverage of a federal statutory scheme to govern an area of traditional state function that had *not previously* been subject to any such federal scheme, and thus to "upset the usual constitutional balance of federal and state powers." 59 L.W. 4716. If the answer to that question is "yes"—if Congress has squarely determined that the state function in question should be governed by the federal statutory scheme—that determination must be taken to entail the conclusion that all those uniform rules that make up that federal statutory scheme should govern the relevant function. Certainly that is the only fair conclusion here.

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gress substantially amended the FLSA to alter many of the substantive rules regarding compensation standards, as those rules apply to state employees, in order to accommodate certain of the special needs of state employers. In so doing, Congress left the coverage of the statute unchanged in all relevant respects. *See* Fair Labor Standards Amendments Act of 1985, P.L. 98-150; 99 Stat. 790 (1985).

The FLSA, as we have noted, unmistakably applies to private and public employers. And petitioners have never argued—nor could they have argued—that the statute evidences any intent that private employers and public employers be treated differently with regard to the statutory duties and policies at issue here. As to these matters, the same provisions govern *all* employers. And that is not mere happenstance.

In 1985 Congress extensively revised the FLSA to account for the special needs of state employers and to lessen the burdens that the FLSA places on the states. *See Moreau v. Klevenhagen, supra; see also* note 5, *supra.* As a result, a variety of special rules governing state employment practices are included in the statute. *See, e.g.,* 29 U.S.C. § 207(o) (special rules regarding overtime compensation of state employees). *None* of those amendments, however, would even arguably justify a special rule for state employment regarding the "timely payment duty" at issue here. Given this statutory structure and this history, Congress simply could not have been plainer.[6]

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[6] Even more misguided than petitioners' argument based on *Gregory* is petitioners' argument that the decision below conflicts with this Court's recent decision in *New York v. United States*, —— U.S. ——, 60 L.W. 4603 (1992). *See* Pet. 14-16.

In *New York*, this Court held that Congress may not, under the Commerce Clause, compel state governments to exercise their *regulatory powers* in the interests of a federal regulatory policy, *viz.*, Congress may not regulate "through the mechanism of mandating state regulation." 60 L.W. at 4613. But the Court explicitly emphasized that this holding had nothing to do with "whether . . . Congress [may] bring state governments within the orbit of generally applicable *federal* regulation." *Id.* at 4612 (emphasis in original). The instant case does not even arguably involve any federal mandate that a state exercise state regulatory authority; rather, it involves only a congressional decision to "bring state governments"—when they act as employers—"within the orbit of [the] generally applicable *federal* regulation" that governs employers and their compensation practices, *viz.*, the FLSA. *See* Pet. App. 19 (rejecting petitioners' *New York* argument).

C. The Instant Case Presents No Substantial Intrusions Into Federalism Interests That Would Justify Any Reconsideration Of This Court's *Garcia* Decision.

1. The FLSA's "timely payment" rule serves important national public policy purposes that Congress was fully entitled to further through Commerce Clause legislation. As this Court stated in the *Brooklyn Savings Bank* decision:

> [The FLSA] constitutes a Congressional recognition that failure to pay the statutory minimum *on time* may be . . . detrimental to maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers and to the free flow of commerce. [324 U.S. at 707 (emphasis added; internal quotation marks omitted).]

See also Sniadach v. Family Finance Corp., 395 U.S. 337, 341-42 (1969) (the postponement of a paycheck "may as a practical matter drive a wage-earning family to the wall").

Petitioners argue that the Constitution disables Congress from furthering these legitimate Commerce Clause policies in the public sector through *any* federal requirement that a state must pay wages to its employees in a regular and timely manner. *Any* federal "timely payment" rule, they argue, would put temporal pressures on the state budgetary process, thereby invading the "core of state self governance" protected by the Tenth Amend ment. Pet. 14.

On this basis, petitioners urge this Court to override *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and to hold that the application of *any* FLSA "timely payment" rule violates the Tenth Amendment.

2. "The very concept of the rule of law" renders "a respect for precedent . . . indispensable." *Planned Parenthood v. Casey*, —— U.S. ——, 60 L.W. 4795, 4801

(1992). Any plea for overruling must therefore be supported by a showing that the demands of *stare decisis* are outweighed by "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the . . . costs of . . . overruling a prior case." *Id.* Petitioners have made no such showing here.

This omission is not surprising: the relevant "prudential and pragmatic considerations" do *not* support the outcome that petitioners seek. Thus, the *Garcia* rule has certainly not "proved to be intolerable simply in defying practical workability." 60 L.W. at 4801 (*citing Swift v. Wickham*, 382 U.S. 111, 116 (1965)). Nor has it become "a remnant of abandoned doctrine" in relation to "related principles of law." 60 L.W. at 4801 (*citing Patterson v. McLean Credit Union*, 491 U.S. 164, 173-74 (1989). And surrounding facts have certainly not "so changed" since the *Garcia* decision "as to have robbed the old rule of significant application." 60 L.W. at 4801 (*citing Burnet v. Colorado Oil Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting). In contrast, there has been substantial reliance on the law of *Garcia*. *See* 60 L.W. at 4801 (*citing United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924)).

2. Being unable to deal with this matter in any of these terms, petitioners assert in the most general terms, that a state's "basic governmental functions" are intolerably burdened by a federal "timely payment" rule. Pet. 19. That argument has a hollow ring.

First, the rule at issue requires only that FLSA compensation be paid on a timely basis under *whatever* regular pay scheme the employer has established. Under the FLSA, public employers—like private employers—may establish a regular pay period and a regular pay day that best meet their economic and administrative needs.

Second, under the FLSA rule the state has the widest latitude in making its own budget arrangements. A state

that does not finalize an overall budget is free, for example, to adopt a continuing resolution or other authorizing device for paying its employees' FLSA wages for *work that has been performed and for wages that are due.* Indeed, California law provides for budget arrangements that would allow the state to fully comply with its FLSA obligations during any budget controversy, if the state chooses to do so. And, during the 1992 budget controversy—unlike during the 1990 controversy—petitioners paid respondents their full wages on time by using these arrangements.[7]

And, third, as we have already noted, the only significant cost that, as a practical matter, has been imposed on the state in this case, is the cost of interest for the period during which the state withheld the wages due to its employees under the FLSA.

3. Petitioners, moreover, do not even claim that their concept of state sovereignty rests on any specific concept of state sovereignty recognized by this Court, or by any individual Justice. Indeed, petitioners' argument—that state sovereignty depends on the state's right to mandate that its employees, as a condition of continued employment, perform labor without receiving payment for that labor for an indefinite period after payment is due—denigrates the very dignity of the states that petitioners' profess to champion. And while petitioners' offer in this

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[7] At least since 1983, California law has provided that the State Controller may transfer up to ten percent of any appropriation for a state entity into a "revolving fund," which may be used by that state entity "for the purpose of payroll and other claims" if, due to a subsequent budget controvery, the legislature fails to pass, in a timely manner, a subsequent appropriation for that entity's operations. *See* Cal. Gov't Code § 13332. This provision of law was enacted specifically in order to ensure "continuity of state government in the event that a budget act for any fiscal year is not enacted by the first day of that fiscal year." 1983 Cal. Legis. Serv., Ch. 323, ¶ 19.5, p. 1755.

regard is phrased in terms of the public employer-employee relationship, that offer admits of no limits. Given the essential nature of petitioners' argument, *any* federal regulation imposing *any* obligation on a state to pay for goods or services by a date certain, or to pay interest on any past due debt or liability, would be equally contrary to the petitioners' conception of state sovereignty.

As the paucity of citations in the Petition indicates, this has *never* been the law. And, as is indicated by the lack of any reasoned defense in the Petition of this extraordinary expansion of "core" state authority, and equally extraordinary subordination of Congress' Commerce Power to a "state's sovereignty," it most certainly should not become the law.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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